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ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

D121/4/1/4

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea

Case File N° 004/07-09-2009-ECCC/OCIJ (PTC05)

Before: **Judge PRAK Kimsan, President**
Judge Rowan DOWNING
Judge NEY Thol
Judge Chang-ho CHUNG
Judge HUOT Vuthy

Date: **15 January 2014**

CONFIDENTIAL
CONSIDERATIONS OF THE PRE-TRIAL CHAMBER ON TA AN'S APPEAL AGAINST THE DECISION DENYING HIS REQUESTS TO ACCESS THE CASE FILE AND TAKE PART IN THE JUDICIAL INVESTIGATION

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (the "ECCC") is seised of the "Appeal against the Decision on the TA An Defence Requests to Access the Case File and Take Part in the Judicial Investigation" filed by the Co-Lawyers for TA An on 30 August 2013 (the "Appeal").[1]

I. INTRODUCTION

1. This Appeal concerns a decision by the International Co-Investigating Judge rejecting two requests by TA An to get access to the case file in Case 004, through his lawyers, and to be allowed to participate in the judicial investigation, on the basis that he has not yet been charged.

a) Procedural background

2. On 7 September 2009, the then Acting International Co-Prosecutor filed with the Co-Investigating Judges the Third Introductory Submission dated 20 November 2008 (the "Introductory Submission"), thereby opening and formally commencing a judicial investigation into, *inter alia,* crimes for which TA An is alleged to be responsible.[2]

3. On 29 July 2010 and 20 September 2010, the Defence Support Section (the "DSS") requested access to the case file for the Suspects in Case 004, and the granting of other procedural rights, including the right to participate in the judicial investigation as set out in Internal Rules 55(8) and 55(10).[3] Similar requests were reiterated by a Cambodian lawyer assigned by the DSS to represent the interests of unnamed Suspects in Case 004 on 14 February 2011 and 29 April 2011.[4] These requests were all denied by the two Co-Investigating Judges in office at the time (Judges YOU and BLUNK) on the basis that the Suspects, who had not been charged following the procedure set out in Internal Rule 57, were not "party to the proceedings" and therefore not

[1] Appeal against the Decision on the TA An Defence Requests to Access the Case File and Take Part in the Judicial Investigation, filed in English on 30 August 2013 and in Khmer on 26 September 2013, D121/4/1/1 (the "Appeal").
[2] Co-Prosecutor's Third Introductory Submission, 20 November 2008, D1; Acting International Co-Prosecutor's Notice of Filing of the Third Introductory Submission, 7 September 2009, D1/1.
[3] Letter from the Chief of the DSS to the Co-Investigating Judges entitled "DSS letter on defence rights in case 003 and 004", 29 July 2010, D4.1.29; Follow-up to DSS letter on defence rights in case 003 and 004, 20 September 2010, A1/1.
[4] Request fo Access to Case Files 003 and 004, filed by KONG Sam Onn on 14 February 2011, D4; Motion for Reconsideration of the Decision on the Defence Request for Access to Case Files 003 and 004 Dated 5 April 2011, 29 April 2011, D4/2.

entitled to have access to the case file. The Co-Investigating Judges further considered that the Suspects had not been "substantially affected" by the investigations.[5]

4. On 29 February 2012, the then Reserve International Co-Investigating Judge (Judge KASPER-ANSERMET) notified TA An in writing, and orally, that "he is named as a suspect in the ongoing judicial investigation" and that "in accordance with the Internal Rules of the ECCC [Rule 21(1)(d)], procedural rights and guarantees attached to the status of Suspect notably include the right to be defended by a lawyer of his [...] choice [and] to have access to the case file" (the "29 February Notification").[6]

5. On 26 March 2012, TA An designated counsel to represent him,[7] whom were first recognized by the then Reserve International Co-Investigating Judge as his Co-Lawyers on 3 May 2012 pursuant to Internal Rule 22(2)(a).[8]

6. On 14 December 2012, TA An filed an Urgent Motion Requesting Order for Access to the Case File, asking the Co-Investigating Judges to order the Office of Administration to provide him access to the case file in Case 004 (the "Request for Access to the Case File").[9] The request was reiterated in a letter sent to the Co-Investigating Judges on 20 December 2012,[10] and then again on 17 June 2013,[11] following a decision issued by the International Co-

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[5] Letter from the Co-Investigating Judges to the Chief of the DSS entitled "Response of the CIJs on Defence rights in Case File 003 and 004", 23 September 2010, D4.1.31; Decision on Request for Access to Case Files 003 and 004, 5 April 2011, D4/1; Order on Motion for Reconsideration of the Decision on the Defence Request for Access to Case Files 003 and 004 Dated 5 April 2011, 19 May 2011, D4/2/1.

[6] Notification of Suspect's Rights [Rule 21(1)(D)], dated 24 February 2012 and notified on 29 February 2012, D110. *See also* Letter to the Defence Support Section on Notification of Suspect's Rights [Rule 21(1)(D)], 6 March 2012, D111, para. 4.

[7] Form 7: Request for Engagement/Assignment of Co-Lawyers, 26 March 2012, D111/2.1 (whereby TA An designated MOM Luch and Richard ROGERS as his lawyers).

[8] Lawyer's Recognition Decision, Reserve International Co-Investigating Judge, 3 May 2012, D111/5 (recognizing MOM Luch and Richard ROGERS as the Co-Lawyers for TA An). This Order was subsequently vacated by the International Co-Investigating Judge insofar as the recognition of Richard ROGERS is concerned. *See* Decision on Motion and Supplemental Brief on Suspect's Right to Counsel, 17 May 2013, D122/6 ("Decision on Right to Counsel"). On 9 August 2012, TA An additionally designated Göran SLUITER to represent him, whom was recognized by the International Co-Investigating Judge on 17 May 2013. *See* Form 7: Request for Engagement/Assignment of Co-Lawyers, 9 August 2012, D111/8 *and* Decision on Right to Counsel, para. 109.

[9] Urgent Motion Requesting Order for Access to the Case File, 14 December 2012, D121/2/1.1.1 (the "Request for Access to the Case File").

[10] Letter from MOM Luch, Richard ROGERS and Göran SLUITER to the Co-Investigating Judges entitled "Ta An's Right to Information as to the Nature and Cause of the Charge Against Him and His Right to Adequate Facilities to Prepare his Defence", 20 December 2012, D121/1.

[11] Letter from MOM Luch and Göran SLUITER to the Co-Investigating Judges and the Co-Prosecutors "concerning the failure of the Co-Investigating Judges to grant access to the case file to the Co-Lawyers for TA An", 17 June 2013, D122/7.

Investigating Judge (Judge HARMON) on 1st April 2013 in which he granted access to the case file to lawyers for Civil Parties in Case 004.[12]

7. On 15 February 2013, TA An filed an "Appeal Against Constructive Dismissal of Urgent Motion Requesting Order to Access the Case File" before the Pre-Trial Chamber,[13] which was subsequently withdrawn on 9 April 2013[14] following information on the treatment of the Request for Access to the Case File being provided by the International Co-Investigating Judge.[15]

8. On 12 March 2013, TA An requested the Co-Investigating Judges to be allowed to participate in the judicial investigation in Case 004, notably to submit questions to witnesses (the "Request for Participation in the Investigation").[16]

9. On 31 July 2013, the International Co-Investigating Judge (Judge HARMON) dismissed the Requests for Access to the Case File and for Participation in the Investigation, on the basis that TA An, who has not been officially charged, is not a party to the proceedings and therefore not entitled to take part in the investigation nor to have access to the case file (the "Impugned Decision").[17] The International Co-Investigating Judge also reconsidered the portions of the 29 February Notification (oral and written) granting TA An access to the case file and vacated them.[18]

10. On 8 August 2013, TA An filed a Notice of Appeal against the Impugned Decision[19] and, on 30 August 2013, he filed the Appeal. In the Appeal, TA An requested the Pre-Trial Chamber to convene a public hearing to hear oral submissions before deciding on the Appeal.[20]

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[12] Lawyer's Recognition Decision Concerning All Civil Party Applications on Case File No.004, 1 April 2013, D126.
[13] Appeal Against Constructive Dismissal of Urgent Motion Requesting Order for Access to the Case File, 15 February 2013, D121/2/1.
[14] Notification of Withdrawal of Appeal, 9 April 2013, D121/2/2; Decision on Notice of Withdrawal of Appeal Against the Constructive Dismissal of TA An's Request for Access to the Case File, 12 April 2013, D121/2/3.
[15] Note by the International Co-Investigating Judge Forwarding an Appeal to the Pre-Trial Chamber, 26 February 2013, D121/2.
[16] Letter from MOM Luch, Richard ROGERS and Göran SLUITER to the Co-Investigating Judges entitled "Participation by the Defence in judicial investigations in Case 004", 12 March 2013, D121/3 (the "Request for Participation in the Investigation").
[17] Decision on the TA An Defence Requests to Access the Case File and Take Part in the Judicial Investigation, 31 July 2013, D121/4 (the "Impugned Decision").
[18] Impugned Decision, para. 49.
[19] TA An Notice of Appeal Against the International Co-Investigating Judge's Decision on the TA An Defence Requests to Access the Case File and Take Part in the Judicial Investigation, 8 August 2013, D121/4/1.
[20] Appeal, para. 2.

11. No response or submissions from the Co-Prosecutors or any Civil Parties were filed within the deadline for the filing of such set out in the Internal Rules.

b) The Appeal

12. TA An submits that insofar as it concerns the rejection of the Request to Participate in the Investigation, the Appeal is admissible under Internal Rule 74(3) which allows appeals against decisions of the Co-Investigating Judges refusing requests for investigative actions.[21] TA An further submits that the Appeal is admissible in its entirety under Internal Rule 21, as it "involves fundamental rights, going to the heart of the fairness of proceedings, as well as consideration of equality of arms".[22]

13. On the merits, TA An argues that i) the Impugned Decision "is predicated on an erroneous interpretation of the judicial power to reconsider"; ii) "[t]he [International Co-Investigating Judge] erred in failing to interpret 'criminal charge' as an automonous concept and in light of its object and purpose to protect fair trial rights"; iii) "[he] is subject to a 'criminal charge' under the disjunctive test of the European Court of Human Rights (the "ECtHR") as applied by Judges YOU Bunleng and Siegried BLUNK in Case (sic.) 004"; iv) "[t]he [International Co-Investigating Judge] erred in rejecting the impact of the media attention in the instant case and disregarding the effect (sic.) of the case on [his] fragile health"; v) "[t]he [International Co-Investigating Judge] Decision is in violation of the principle of equality of arms"; and (vi) "[t]he [International Co-Investigating Judge] erred in granting access to the case file to civil party lawyers and exacerbated the procedural inequalities that exist in the case against [him]".[23] TA An therefore requests the Pre-Trial Chamber to overturn the Impugned Decision and "[o]rder that [his] recognised lawyers be given access to the case file".[24]

c) Oral Arguments

14. Internal Rule 77(3)(b) provides that "[t]he Pre-Trial Chamber may, after considering the views of the parties, decide to determine an appeal [...] on the basis of the written submissions of the parties only". Having considered the ample written submissions made on behalf of TA An and

[21] Appeal, para. 11.
[22] Appeal, paras 12-13.
[23] Appeal, para. 25.
[24] Appeal, para. 81.

absent any response filed by the Co-Prosecutors or any civil parties, the Pre-Trial Chamber does not consider it necessary to hear oral arguments in this case and hereby renders its conclusion on the Appeal.

II. EXPRESSION OF OPINION AND CONCLUSION

15. Despite its efforts, the Pre-Trial Chamber has not attained the required majority of four affirmative votes in order to reach a decision on the Appeal. Given that Internal Rule 77(14) provides that the Chamber's decision shall be reasoned, the opinions of its various members are attached to these Considerations.

16. As the Pre-Trial Chamber has not reached a decision on the Appeal, Internal Rule 77(13) dictates that the Impugned Decision shall stand.

III. DISPOSITION

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY:

UNANIMOUSLY DECLARES that it has not assembled an affirmative vote of at least four judges on a decision on the Appeal.

In accordance with Internal Rule 77(13), there is no possibility to appeal.

Phnom Penh, 15 January 2014

President **Pre-Trial Chamber**

PRAK Kimsan **Rowan DOWNING** **NEY Thol** **Chang-ho CHUNG** **HUOT Vuthy**

Judges PRAK Kimsan, NEY Thol and HUOT Vuthy append their opinion.
Judges Chang-ho CHUNG and Rowan DOWNING append their opinion.

OPINION OF JUDGE PRAK KIMSAN, NEY THOL AND HUOT VUTHY

Admissibility of the Appeal

1. The appeal against the decision denying the request by the defence team to access the case file and take part in the judicial investigation pursuant to Internal Rule 73, which is an Additional Jurisdiction of the Pre-Trial Chamber. Internal Rule 73(a) grants jurisdiction to the Pre-Trial Chamber over appeals against decisions and investigative action of the Co-Investigating Judges as stipulated in Rule 74.

2. Internal Rule 74(3)(b) provides that the *charged person or accused* may appeal against the orders or decisions of the co-investigating judges "refusing request for investigative action allowed under these Internal Rules ".

3. We shall examine whether TA An is currently a "charged person" or an "accused".

4. The defence team for the Suspect (TA An) alleges that, "[t]he Internal Rules provides in Rule 21 on Fundamental Principles before the ECCC that the applicable law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of the Suspects...".[1]

5. The defence Team for the Suspect (TA An) also make reference to the various rules in these Internal Rules on the rights to access case files as follows:[2]

   - Rule 55(6) provides that "[t]he Greffier of the Co-Investigating Judges shall keep a case file, including a written record of the investigation. At all times, the Co-Prosecutors and the lawyers for the other parties shall have the right to examine and make copies of the case file under the supervision of the Greffier of the Co-Investigating Judges, during working days and subject to the requirements of the proper functioning of the ECCC".

   - Rule 86 provides that "[a]t all times, the Co-Prosecutors and the lawyers for the other parties shall have the right to examine and obtain copies of the case file, under

[1] The Appeal, para. 14.
[2] The Appeal, para. 15.

supervision of the Greffier of the Chamber, during working days and subject to the requirements of the proper functioning of the ECCC".

- Rule 55 (11) provides that "[t]he Co-Prosecutors and the lawyers for the other parties shall have the right to consult the original case file, subject to reasonable limitations to ensure the continuity of the proceedings".

- Rule 22(3) provides that "[...] Lawyers may obtain a copy of the case file, or record of proceedings, and bring this, together with any other relevant documents to discuss with their client".

6. The Rules to which the appellant has referred use the terms "suspect" and "party". According to the glossary attached to the Internal Rules, the term *"Suspect"* refers to "a person whom the Co-Prosecutors or the Co-Investigating Judges consider may have committed a crime within the jurisdiction of the ECCC, but has not yet been charged". The term *"Party"* refers to "the Co-Prosecutors, the Charged Person/Accused and Civil Parties".

7. We observe that the Co-investigating Judges have not officially charged or placed any person under judicial investigation in case 004 yet. The defence team for the Suspect has itself changed the status of the *"Suspect"* to that of *"Charged Person"*, while the Co-investigating Judges have not formally changed such status yet. In its urgent request, the defence team cited the term in the glossary of the Internal Rules in which "Charged Person" refers to "any person who is subject to prosecution in a particular case, during the period between the Introductory Submission and Indictment or dismissal of the case". We concur with the International Co-investigating Judge that the definition refers to the 'Charged Person', not the 'Suspect' who has not been charged, and merely indicates the timeframe during which a person may become a charged person.[3] Likewise, in French, "Charged Person" *(Personne mise en examen)* means "the person who is put under judicial investigation" and as of now the Co-Investigating Judges have not yet put TA An under judicial investigation as provided for under Internal Rule 55 and Article 126 of the Code of Criminal Procedure of Cambodia.

[3] Case File 004, D 121/4 Decision on TA An Defence Requests to Access the Case File and Take Part in the Judicial Investigation

8. For these reasons, the Suspect is not a party to the proceedings and neither is he a charged person. Therefore, at this stage of the proceedings, he is not accorded a status of a party.

9. Article 124 on Introductory Submission of the Code of Criminal Procedure of Cambodia adopted on 7 June 2007, provides that:

> "A judicial investigation shall be opened after the prosecutor presents the introductory submission. As provided in Art. 44, paragraph 2, a judicial investigation may be opened against one or more persons whose names are specified in the introductory submission or against unidentified person(s).
>
> An investigating judge may not conduct any investigative action in the absence of an introductory submission. When an investigating judge receives a complaint with the request to become a civil party, the investigating judge shall follow the procedures stated in Art. 139 and Art.140 of this Code [...]."

10. Article 126 on Judicial Investigation under the Code of Criminal Procedure provides that:

> "An investigating judge shall put the person or persons named in the introductory submission under judicial investigation. The investigating judge has the power to place any person under judicial investigation provided that there is clear and corroborated evidence proving that such person(s) is involved in the commission of the crime even if his/her name is not identified in the introductory submission."[...].

11. Third Introductory Submission have formed case file 004/20-11-2008 ECCC/OCIJ which was forwarded to the Office of Co-Investigating Judges to open judicial investigation. However, the case file has not been agreed upon by the National Co-Prosecutor.[4]

12. When seized of a disagreement pursuant to Internal Rule 71 between the Co-Prosecutors related to the filing of the Third Introductory Submission, the Pre-Trial Chamber "declare[d] that it ha[d] failed to reach super majority of at least four judges to decide

[4] The Case of Disagreement between the National and International Co-Prosecutors, 30 December 2008, Document No. 1.

definitively on the disagreement".[5] Hence, according to Internal Rule 74(1) the default decision was that the act of the international co-prosecutor shall stand, meaning that the International Co-Prosecutor had to forward the introductory submission for judicial investigation in accordance with Internal Rule 53(1). As such, the issue of personal jurisdiction of the ECCC over the Suspects has not been addressed, which is contrary to Case File 001 and Case File 002.

13. After being seized of the Third Introductory Submission, the Co-Investigating Judges have not yet decided to place any person under judicial investigation. In this sense, TA An et.al who are the suspects have not been accorded the status of the Charged Person or Accused as of now.

14. The decision to charge is under the discretion of the Co-Investigating Judges. Pursuant to Internal Rule 55(4), Co-Investigating Judges has the discretionary power to charge a suspect or any other person named in the introductory submission, provided that "there is *clear and consistent evidence*". This same standard applies consistently to other cases which were investigated by the OCIJ and was raised in the previous decisions in Case File 004.[6]

15. The Co-Investigating Judges have asserted that "Defence rights are fully exercisable (and the equality-of-arms principle must be strictly upheld) once a person is charged and thereby becomes a party to the proceedings. However, as long as a person is not officially charged, his/her rights remain limited. This is the case in all procedural systems".[7] We agree with the findings of Co-Investigating Judges.

16. For the afore-mentioned reasons, since TA An is a suspect as of now, he has no right to file an appeal before the Pre-Trial Chamber pursuant to Internal Rule 74(3)(b). Therefore, the appeal is inadmissible.

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[5] Adjudication of the Pre-trial Chamber concerning the disagreement between the co-prosecutors pursuant to IR71, 15 August 2009.
[6] Case File 002, D198/1, Order Concerning the Co-Prosecutors' Request for Clarification of Charges, 20 November 2009.
[7] Case File 004, D4.1.31 Co-investigating Judges' Response concerning the Defence Rights in Case File 003 and 004, 23 September 2010.

17. We hereby reject the appeal as inadmissble.

Phnom Penh, 15 January 2014

PRAK Kimsan **NEY Thol** **HUOT Vuthy**

OPINION OF JUDGES CHANG-HO CHUNG AND ROWAN DOWNING

I- ADMISSIBILITY OF THE APPEAL

1. TA An submits that the Appeal, insofar as it challenges the decision denying his Request to Participate in the Judicial Investigation, is admissible under Internal Rule 74(3)(b).[1] He further submits that the Appeal is admissible in its entirety under Internal Rule 21, as it "involves fundamental rights, going to the heart of the fairness of proceedings, as well as consideration of equality of arms."[2] In TA An's view, "the fact that the [International Co-Investigating Judge] erroneously denies [him] rights which should apply to Suspects and Charged Persons alike should not affect the admissibility of the present appeal."[3]

2. At the heart of the Appeal lies the issue of whether TA An, as a Suspect named in the Introductory Submission, is entitled to participate in the judicial investigation at this stage of the proceedings, *inter alia* by making requests for investigative actions. The Impugned Decision prevents TA An from doing so until being formally charged, not only by explicitly rejecting his Request for Participation in the Investigation but also by dismissing his Request to Access the Case File. Without any access to the case file, TA An's ability to present requests for investigative actions is obviously limited, if not nonexistent. The Appeal claims that the Impugned Decision infringes upon TA An's fair trial rights as enshrined in Article 14(3) of the International Covenant on Civil and Political Rights (the "ICCPR") and Internal Rule 21, especially the rights to an adversarial debate, to prepare a defence and to equality of arms.

3. Internal Rule 73(c) grants the Pre-Trial Chamber jurisdiction over "appeals against decisions of the Co-Investigating Judges, as provided in Rule 74". In turn, Internal Rule 74(3)(b) provides that a *Charged Person or Accused* may appeal against orders or decisions of the Co-Investigating Judges "refusing requests for investigative actions allowed under these [Internal Rules]". Internal Rule 55(10) further provides:

> "10. At any time during an investigation, the Co-Prosecutors, *a Charged Person* or a Civil Party may request the Co-Investigating Judges to make such orders or undertake such investigative action as they consider useful for the conduct of the investigation. If

[1] Appeal, para. 11.
[2] Appeal, para. 13.
[3] Appeal, para. 13.

the Co-Investigating Judges do not agree with the request, they shall issue a rejection order as soon as possible and, in any event, before the end of the judicial investigation. *The order, which shall set out the reasons for the rejection, shall be notified to the parties and shall be subject to appeal.*" (emphasis added)

4. These rules shall be interpreted in light of the fundamental principles expressed in Internal Rule 21, which provides, in its relevant parts:

> **Rule 21. Fundamental Principles**
>
> 1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations *shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons*, Accused and Victims and so as to ensure legal certainty and *transparency of proceedings*, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement. In this respect:
>
> a) *ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties.* [...]
>
> [...]
>
> d) Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. *Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice*, and at every stage of the proceedings shall be informed of his/her right to remain silent." (emphasis added)

The Pre-Trial Chamber has previously considered that the fundamental principles expressed in Internal Rule 21, which reflect the fair trial requirements that the ECCC is bound to apply pursuant to Article 13(1) of the Agreement between the United Nations and the Royal Government of Cambodia (the "Agreement"),[4] 35*new* of the ECCC Law[5] and 14(3) of the ICCPR,[6] may warrant that it adopts a liberal interpretation of the right to

[4] Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Kampuchea Democratic, 6 June 2003.
[5] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Kampuchea Democratic, with inclusion of amendments as promulgated on 27 October 2004 ("ECCC Law").
[6] *See, e.g.,* Case 002/19-09-2007-ECCC/OCIJ ("Case 002") (PTC64), Decision on IENG Sary's Appeal Against Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12, paras. 13-18; 27 ("It is clear that Article 14(3) of the ICCPR

appeal in order to ensure that the proceedings are fair and adversarial and that a balance is preserved between the rights of the parties.[7] Where the particular facts and circumstances of a case required, the Pre-Trial Chamber has admitted appeals raising issues of fundamental rights or "serious issue[s] of fairness", by either adopting a broad interpretation of a specific provision granting a right to appeal[8] or even by assuming jurisdiction over appeals that did not fall within its explicit jurisdiction, on the basis of Internal Rule 21.[9]

5. We note that the right to appeal under Internal Rule 74(3)(b) is reserved to a "Charged Person", as is the right to request investigative actions under Internal Rule 55(10). However, the present Appeal specifically challenges the interpretation of the notion of "Charged Person" adopted by the International Co-Investigating Judge[10] and argues that TA An's fair trial rights mandate that he be allowed to participate in the investigation at this stage of the proceedings and, as a corollary, that his lawyers be given access to the case file. Whilst the Impugned Decision does not in itself reject a request for investigation allowed under the Internal Rules, it has the effect of preventing TA An from requesting *any investigative action*, in circumstances which, it is alleged, deprives TA An from fair and adversarial proceedings. We consider that the particular circumstances of this case call for a broad interpretation of the right to appeal under Internal Rule 74(3)(b), in the light of the fundamental principles set out in Internal Rule 21.

6. We therefore find the Appeal admissible under Internal Rule 74(3)(b).

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provides that a person facing criminal charges enjoys certain minimum guarantees, including the right to have adequate time and facilities to prepare his defence [...]. The Pre-Trial Chamber is specifically directed to take into account Article 14 of the ICCPR by the operation of Article 13 of the Agreement and by Article 35 new of the ECCC Law. In the instant matter the Pre-Trial Chamber must determine whether, contrary to Rule 21, the Impugned Order deprives the Appellant of the rights guaranteed by Article 14 of the ICCPR.")

[7] *See, e.g.,* Case 002 (PTC11), Decision on KHIEU Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, para. 36; Case 002 (PTC71), Decision on IENG Sary's Appeal against Co-Investigating Judges' Decision Refusing to Accept the Filing of IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of Proceedings, 20 September 2010, D390/1/2/4 ("Decision on IENG Sary's Response"), para. 13; Case 002 (PTC14), Decision on Defence Notification of Errors in Translations, 17 December 2010, Doc. No. 2 ("Decision on Errors in Translation"), para. 3; Case 002 (PTC75), Decision on IENG Sary's Appeal against the Closing Order, 11 April 2011, D427/1/30, para. 49.

[8] *See, e.g.* Case 002 (PTC05), Decision on the Admissibility of the Appeal Lodged by IENG Sary on Visitation Rights, 21 March 2008, A104/II/4, para. 10.

[9] *See, e.g.,* Cases 002 (PTC42), Decision on IENG Thirith's Appeal Against the Co-Investigating Judges' Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process, 10 August 2010, D264/2/6, paras 13-14; Decision on IENG Sary's Response, para. 13 *and* Decision on Errors in Translations, paras 2-6.

[10] *See, inter alia,* Appeal, para. 31 (stating that TA An should be considerd as "being subject of a 'criminal charge' from a substantive point of view.")

II- MERITS OF THE APPEAL

A) Whether the International Co-Investigating Judges erred in reconsidering the 29 February Notification

7. In the Impugned Decision, the International Co-Investigating Judge reconsidered the portions of the 29 February Notification granting TA An access to the case file and vacated them. He did so on the basis of his finding that the then Reserve International Co-Investigating Judge abused his discretion in granting TA An rights to which, as a suspect, he was not entitled pursuant to the Internal Rules and without providing any justification.[11]

8. TA An argues that the International Co-Investigating Judge erred in revoking the right to access the case file already attributed to him, without first giving him the opportunity to make submissions.[12] He further argues that the International Co-Investigating Judge erred in the interpretation and exercise of his power to reconsider previous decisions given that "[he] is not a judicial body of last resort and he has sought to invoke this power unilaterally – without the support of his national counterpart – to vacate the decision of a predecessor which goes to the heart of the fairness of proceedings in Case 004".[13] Finally, TA An avers that given the International Co-Investigating Judge has sought to set aside the 29 February Notification rather than declaring it null and void *ab initio*,[14] his lawyers "should have had access to the case file, at least until the [Impugned Decision]".[15]

9. The Pre-Trial Chamber has previously recognized the inherent power of ECCC judicial bodies to reconsider their previous decisions when there is a change of circumstances or where it is realised that the previous decision was erroneous or that it has caused an injustice.[16] While reconsideration can be done *proprio motu*,[17] principles of natural justice

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[11] Impugned Decision, para. 49.
[12] Appeal, para. 27.
[13] Appeal, para. 28.
[14] In this context, this expression means "as from the beginning".
[15] Appeal, para. 30.
[16] *See, e.g.,* Case 002 (PTC03), Decision on Application for Reconsideration of Civil Party's Right to Address the Pre-Trial Chamber in Person, 28 August 2008, C22/I/68, para. 25; Case 002 (PTC73 and others), Decision on Appeals Against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/2/4, para. 106; Case 002 (PTC02), Decision on Ieng Sary's Motion for Reconsideration of Ruling on the Filing of a Motion in the Duch Case File, 3 December 2008, D99/3/41, paras 6 and 7; Case 002 (PTC24/25), Decision on Request to Reconsider the Decision on Request for an Oral Hearing on the Appeals PTC 24 and PTC 25, 20 October 2009, D164/4/9, para. 12.
[17] In this context, this means on the initiative of the judge.

and procedural fairness require that any party or other concerned individual whose rights or interests may be affected be accorded the right to be heard prior to such decision being made.[18]

10. In the present case, the decision to reconsider the 29 February Notification was prompted by a renewed request from TA An to be given access to the case file. TA An, who could legitimately expect that the 29 February Notification was valid and legally binding, sought, on a number of occassions, that it be implemented, thus asserting the apparently given right.[19] In response, the International Co-Investigating Judge withdrew the right to access the case file that had been previously granted, without giving TA An any advanced notice

[18] *See Prosecutor v. Nzabonimana*, ICTR-98-44D-AR7Bis, Decision on Callixte Nzabonimana's Interlocutory Appeal on the Order Rescinding the 4 March 2010 Decision and on the Motion for Leave to Appeal the President's Decision Dated 5 May 2010, Appeals Chamber, 20 September 2010, para. 29 ("while a Trial Chamber may *proprio motu* decide to reconsider its own decision, this does not relieve it of its duty to hear a party whose rights may be affected by this reconsideration") *and* Case 002 (PTC47), Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications, 24 June 2011, D404/2/4, para. 117, *together with* Direction on the Reconsideration of the Admissibility of Civil Party Applications, 23 June 2010, D250/3/2/1/6 (where the Pre-Trial Chamber initiated *proprio motu* the possibility of reconsidering earlier decisions declaring civil party applications inadmissbile, but found that it could not make any decision without first seeking the views of, *inter alia,* the Accused and therefore invited any party to make submissions). *See also*, more generally on the right to be heard before a decision affecting ones rights is taken: Case 002 (SC18), Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, 8 February 2013, E163/5/1/13, para. 42 ("The need to respect the right to be heard in criminal proceedings [...] is dictated by common sense and the interests of meaningful justice, and conforms with comparable international legal standards."); International Court of Justice, *Australia v. France*, Judgment (Nuclear Tests Case- Dissenting Opinion of Judge Sir Garfield Barwick), 20 December 1974, p. 391 ("In any case the Applicant must have been entitled to make submissions as to all the matters involved in the decision of the Court." This statement does not *per se* stand in opposition to the Majority's opinion; the divergent opinions are rather based on a different appreciation of the circumstances of the case. *See* para. 33 of the Majority Opinion); *Prosecutor v. Jelisic*, IT-95-10-A, Judgment, Appeals Chamber, 5 July 2001, para. 27 ("[T]he fact that a Trial Chamber has a right to decide *proprio motu* entitles it to make a decision whether or not invited to do so by a party; but the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made."); *Prosecutor v. Perisic*, IT-04-81-T, Decision On Defence Motion For Reconsideration Of Document Admitted Proprio Motu, Trial Chamber I, 28 February 2011, paras 6 and 15 (where the Trial Chamber accepted to reconsider its previous decision to admit *proprio motu* new evidence as it found that the Defence "should have been afforded a reasonable opportunity to challenge the admission of document"); ECtHR, *Niderost-Huber v. Switzerland*, Application No. 18990/91, Judgment, 18 February 1997, para. 29 (emphasising that the "litigants' confidence in the workings of justice [...] is based on, inter alia, the knowledge that they have had the opportunity to express their views on every document in the file"); High Court of Australia, *Kioa v. West* (1985) 159 C.L.R. 550 at 582 ("It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it [...]."); French Code of Civil Procedure, Art. 16 (« Le juge doit, en toutes circonstances, faire observer et observer lui-même le principe de la contradiction. Il ne peut retenir, dans sa décision, les moyens, les explications et les documents invoqués ou produits par les parties que si celles-ci ont été à même d'en débattre contradictoirement. Il ne peut fonder sa décision sur les moyens de droit qu'il a relevés d'office sans avoir au préalable invité les parties à présenter leurs observations. »); Stefan Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press, 2006, p. 89 ("no decision, which is not entirely and unconditionally in favour of an individual, may be taken unless the person concerned was previously given the opportunity to state his or her position on the issue.")

[19] *See* Request for Access to Case File, paras 3-4, 8.

and affording him the possibility to make submissions in respect of the matter. This resulted in the decision to reconsider the 29 February Notification being taken in violation of the principle of legal certainty,[20] natural justice and procedural fairness, thereby causing TA An prejudice. We are therefore of the opinion that the Impugned Decision should be overturned insofar as it reconsiders the portions of the 29 February Notification granting TA An access to the case file and that the matter should be remitted back to the Co-Investigating Judges for them to decide afresh the issue of the reconsideration, after having given TA An and all concerned parties the opportunity to be heard and taking into consideration the principles set forth in the following section of this Opinion, which address the merits of TA An's Request for Access to the Case File and to Take Part in the Judicial Investigation.

B) Whether the International Co-Investigating Judge erred in rejecting the Requests for Access to the Case File and for Participation in the Investigation

11. In the Impugned Decision, the International Co-Investigating Judge found that TA An is not entitled to have access to the case file nor to participate in the judicial investigation as he is not a "Charged Person" in the proceedings in Case 004. In particular, the International Co-Investigating Judge found that the Internal Rules reserve these rights *exclusively* to "the Co-Prosecutors and the '*lawyers for the others parties*', namely the Charged Person, the Accused, and Civil Parties"[21] and that Article 14(3)(b) of the ICCPR similarly garantees the right to access to the case file to "persons against whom 'charges' exist".[22] The International Co-Investigating Judge determined that TA An is not a "Charged Person" within the meaning of the Internal Rules or human rights law, given that he has not been formally charged following the procedure set forth in Internal Rule 57 and no decision has been made yet as to whether there is "clear and consistent evidence that [he] may be responsible for the crimes alleged by the Prosecution in the introductory submission."[23] In addition, the International Co-Investigating Judge did not consider that "by receiving notification of his 'suspect' status and of the allegations against him, the Suspect was

[20] *See* Internal Rule 21(1), stating that the ECCC Law and Internal Rules shall be interpreted so as to ensure legal certainty.
[21] Impugned Decision, para. 37.
[22] Impugned Decision, para. 38.
[23] Impugned Decision, paras 44-47.

substantially affected so as to require a departure from the Internal Rules and to warrant the granting of rights which, at this stage of the proceedings, the Suspect does not have".[24] He did not consider either that TA An's fragile health, the media attention to the proceedings or visists by the medias would have such effect.[25] Finally, the International Co-Investigating Judge found that the decision to grant access to the case file to lawyers for the Civil Parties does not support the Requests given the fact that the latter are "party" to the proceedings while the Suspect is not.[26]

12. In his Appeal, TA An submits that the International Co-Investigating Judge erred in "focus[ing] on the formal requirements for charging at the ECCC, as set out in the [Internal Rules], instead of examining whether [he] should be considered as being subject of a 'criminal charge' from a substantive point of view".[27] In particular, TA An asserts that he is subject to "criminal charges" as understood under human rights law,[28] given that he "officially learned of the criminal proceedings against him" when he received the 29 February Notification. [29] TA An also submits that he has been "substantially affected" by the investigation given the fact that he was "approached" by the ECCC authorities on 29 February 2012[30] and he has been visited by representatives of the DSS, for the purpose of facilitating his choosing of lawyers, and then by his lawyers, who have interviewed him and to whom he has given leads into potential investigative actions which may lead to the provision of exculpatory evidence.[31] TA An argues that because "[he] is the subject of a "criminal charge", he is guaranteed the rights that attach to the status of 'charged person'", including the right to have access to the cae file and to participate in the judicial investigation.[32]

13. TA An puts forward a number of additional arguments that, he asserts, are reasons for him to be given access to the case file and to participate in the investigation. First, he argues that the media attention given to Case 004, following a breach of confidentiality of the investigation originating from the ECCC, undermines his right to be presumed innocent and

[24] Impugned Decision, para. 55.
[25] Impugned Decision, paras 56-58.
[26] Impugned Decision, para. 60.
[27] Appeal, para. 31.
[28] Appeal, para. 42.
[29] Appeal, para. 49. *See also* para. 38.
[30] Appeal, para. 51.
[31] Appeal, para. 52.
[32] Appeal, para. 55.

negatively impacts on his fragile health, therefore mandating that he be informed of the allegations made against him in the press and be given an opportunity to respond.[33] Second, he asserts that he is placed at significant disadvantage vis-à-vis the Co-Prosecutors and the Civil Parties, who themselves have access to the case file and have the opportunity to influence the outcome of the judicial investigation, hence infringing upon the principle of equality of arms. In this regards, he argues that the conduct of the investigation without "any input or scrutiny from the Defence" for more than two years since access to the case file was first requested in 2011 risks undermining the fairness of the entire proceedings.[34] He also submits that the procedural inequalities between the opposing parties have been further exarcebated by the International Co-Investigating Judge's decision to grant access to the case file to lawyers for Civil Parties,[35] which displays inherent contradictions in the interpretation of the Internal Rules,[36] stands apart from the principles applied in domestic systems[37] and impacts the confidentiality of the investigation.[38] Third, TA An asserts that "even if there is a statutory basis for limiting his right to access the case file", the International Co-Investigating Judge had to demonstrate that any restrictions on this fundamental right protect legitimate interests, are proportionate to the interest at stake and interfere to the least degree possible with that right, which he did not.[39] Finally, TA An argues that the failure to give him access to the case file deprives him of his right to be effectively represented by counsel, a right that has been acknowldeged by the International Co-Investigating Judge.[40]

14. We note that it is not contested that the Internal Rules reserve the rights to participate in the judicial investigation and to have access to the case file, through a lawyer, to "Charged Persons", who are considered to be "parties to the proceedings" before the ECCC.[41] It is not contested either that the Co-Investigating Judges have not yet decided whether to formally lay charges against TA An, under Internal Rule 55(4), nor to summon him for an initial appearance pursuant to Internal Rule 57. In this context, the Appeal calls for an

[33] Appeal, paras 56-60.
[34] Appeal, para. 66.
[35] Appeal, para. 70.
[36] Appeal, para. 71
[37] Appeal, paras 72-73.
[38] Appeal, para. 74.
[39] Appeal, paras 75-77.
[40] Appeal, para. 79.
[41] *See* Impugned Decision, para. 37, *referring to* Internal Rules 55(6), 55(8), 55(11) and 60, and to the definition of "parties" in the Glossary of the Internal Rules.

examination as to whether TA An – who is named as a Suspect in the Introductory Submission filed by the International Co-Prosecutor[42] – is or should be considered to be a "Charged Person" despite the fact that the procedure set forth in Internal Rules 55(4) and 57 has not been conducted by the Co-Investigating Judges.

15. At the outset, we note that the Internal Rules are not entirely clear in their definitions of "Charged Person", "Suspect" and the exact meaning and consequences of the "charging" process envisaged in Internal Rules 55(4) and 57. This ambiguity has been reflected in the contradictory interpretations of the notion of "Charged Person" adopted by the Co-Investigating Judges first in Case 002 and then in Cases 003 and 004. On the one hand, the Glossary of the Internal Rules explicitly defines "Charged Person" as "any person who is subject to prosecution in a particular case, during the period between the Introductory Submission and Indictment or dismissal of the case." On the other hand, it defines "Suspect" as "a person whom the Co-Prosecutors or the Co-Investigating Judges consider may have committed a crime within the jurisdiction of the ECCC, but has not yet been charged". Insofar as the formal "charging" process is concerned, Internal Rule 55(4) states:

> The Co-Investigating Judges have the power to charge any Suspects named in the Introductory Submission. They may also charge any other persons against whom there is clear and consistent evidence indicating that such person may be criminally responsible for the commission of a crime referred to in an Introductory Submission or a Supplementary Submission, even where such persons were not named in the submission. In the latter case, they must seek the advice of the Co- Prosecutors before charging such persons.

Internal Rule 57 sets out a process for the Co-Investigating Judges to formally notify a *Charged Person* of the charges against him or her, during an "initial appearance".

16. In Case 002, the Co-Investigating Judges, relying upon the definition of "Charged Person", found that "[a]ny person named in the Introductory Submission is referred to as '*the Charged Person*'".[43] They distinguished their power to lay specific charges for which an individual may be indicted and the acquisition of the status of "Charged Person".[44] Their

[42] Introductory Submission, para. 5.
[43] Order Refusing Request for Further Charging, 16 February 2010, D298/2 (the "Order on Further Charging"), footnote 6. *See also* para. 13.
[44] *See* Order on Further Charging, para. 13 *and* Order Concerning the Co-Prosecutors' Request for Clarification of Charges, 20 November 2009, D198/1 ("Order on Clarification of Charges"), paras 10-11 and conclusion. We note

interpretation was based on, and reflected, the position that prevailed in French Law before a judicial reform was adopted in 1993.[45] In Cases 003 and 004, including in the Impugned Decision, the Co-Investigating Judges rather emphasized on the definition of "Suspect", which they distinguished from the status of "Charged Person" on the basis of the occurrence of the formal "charging" process. As a result, they defined "Charged Person" in the light of the procedural requirements for charging under Internal Rules 55(4) and 57, which led them to find that an individual named in an Introductory Submission accrues the status of "Charged Person" only when formally charged by them during an initial appearance.[46] For the reasons set out below, we consider that the interpretation adopted by the Co-Investigating Judges in Case 002, whereby a suspect named in an Introductory Submission is considered to be a "Charged Person", shall prevail.

17. Firstly, we note that the statuses of "Suspect" and "Charged Person" are not defined in relation to each other, so there is no indication that they would be mutually exclusive.[47] Indeed, an individual could possibly fall within both definitions for a certain period of time, which, in turn, would entitle him or her not only to the more limited rights of "Suspects" but also to those afforded to "Charged Persons". Given the fact that TA An claims that he is entitled to the rights attached to the status of "Charged Person", we shall determine whether he falls within the ambit of the specific definition of this status, which must be given full meaning. The definition of "Charged Person" contained in the Glossary of the Internal Rules does not refer to any formal process of being "charged" under Internal Rules 55(4) or 57, but explicitly refers to "any person *who is subject to prosecution* in a particular

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that the reference in the Impugned Decision to the Order on Clarification of Charges to support the interpretation of the notion of "Charged Person" adopted thereto is misguided. When the Co-Investigating Judges YOU and LEMONDE stated in Case 002 that they "have the 'power', but not the obligation, to charge a person, whether or not that person is named in an introductory submission", they were referring to their power to formally notify *Charged Persons* in Case 002 of additional facts and crimes for which they may be indicted following the filing of Supplementary Submissions by the Co-Prosecutors; this statement had nothing to do with the acquisition of the status of "Charged Person" and rather confirms, when put in its context, that the Co-Investigating Judges in Case 002 considered the status of "Charged Person" as being independent from their decision to formally lay specific charges.

[45] *See* Order on Further Charging, para. 13, *referring to* Cass. Crim. 5 November 1985, *Bull. crim.*, No. 344 (where the French Court of Cassation finds that a person named in an introductory submission is automatically considered as a charged person, irrespective of the date of the notification of the charges). *See also*, to the same effect, Cass. Crim. 11 April 1973, *Bull. crim.* 1973 n°190, p. 455 *and* Cass. Crim. 24 May 1971, *Bull. crim.* 1971 n° 171, p. 428.

[46] *See* Impugned Decision, paras 36-37 and 40-44.

[47] The Internal Rules merely indicate that the status of "Suspect" ends when the individual is "charged" and that the status of "Charged Person" starts when the individual is "subject to prosection". These two moments do not necessarily correspond, especially if an individual is named in an Introductory Submission, as more amply detailed below.

case, *during the period between the Introductory Submission* and Indictment or dismissal of the case". In concluding whether an individual qualifies as a "Charged Person" or not, the issue at stake is whether he or she is "subject to prosecution". Obviously, an individual who has been formally charged by the Co-Investigating Judges during an initial appearance is "subject to prosecution" but this is not a prerequisite. The meaning of "subject to prosecution" is broader. It refers to someone against whom a criminal action has been initiated.[48]

18. At the ECCC,[49] similar to Cambodian Law,[50] the responsibility to prosecute – or initiate a criminal action – is vested with the Co-Prosecutors. Legally speaking, they do so by filing an Introductory Submission "either against one or more named persons or against unknown persons", which automatically triggers the opening of a judicial investigation into crimes for which they allege that the named suspects, if any, may be responsible.[51] For individuals named in an Introductory Submission, this is the moment where they become subject to prosecution, as explicitly reflected in the terms of the definition of Charged Person ("during the period between the Introductory Submission (...)"). Indeed, Internal Rule 55(4) explicitly provides that individuals named in an Introductory Submission may be formally charged without the Co-Investigating Judges having first to determine whether there is "clear and consistent evidence" that they may be criminally responsible for the commission of a crime referred to in the Introductory Submission, which is not the case for individuals

[48] *See* Bryan A. Garner (ed.), *Black's Law Dictionary*, 8th ed., 2004, definition of "prosecute" ("To institute and pursue a criminal action against a person".)
[49] *See* Agrement, Art. 6(1) ("There shall be one Cambodian prosecutor and one international prosecutor competent to appear in both Chambers, serving as Co-Prosecutors. They shall be responsible for the *conduct of prosecutions*."); Art. 16 of the ECCC Law ("All indictment in the Extraordinary Chambers shall be the responsibility of two prosecutors" *and* 20 *new* ("The Co-Prosecutors shall prosecute in accordance with existing procedure in force.)
[50] *See* CPC, Art. 2 ("The purpose of the criminal action is to examine the existence of a criminal offense, to prove the guilt of an offender, and to punish this person according to law.") *and* Art. 4 ("Criminal actions are brought by the Prosecutors for the general interests of the society. Prosecutors initiate criminal proceedings and request the application of the law by investigating and trial judges.")
[51] *See* Internal Rules 53(1) ("If the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they *shall open a judicial investigation by sending an Introductory Submission to the Co-Investigating Judges*, either against one or more named persons or against unknown persons.") *and* 55(1) ("A judicial investigation is compulsory for crimes within the jurisdiction of the ECCC.") *See also*, in Cambodia Law: Art. 43 of the CPC ("Criminal proceedings can be conducted through: - the opening of judicial investigation; - a citation; or the procedure of immediate appearance."); Art. 44 (In the case of a felony, the Prosecutor shall open a judicial investigation. The judicial investigation shall be based upon the initial submission provided to the investigating judge. The judicial investigation may be opened against identified or unidentified individuals.") Art. 124 (which reproduces the substance of Art. 44 and adds that "[a]n investigating judge may not conduct any investigative acts in the absence of an introductory submission.")

who are not named .[52] Internal Rule 21(1)(d) further requires that they be "informed of any charges brought against [them], to be defended by a lawyer (...) and of their right to remain silent".[53] Given that they are "subject to prosecution", individuals named in an Introductory Submission automatically fall within the ambit of the definition of "Charged Person" as set out in the Glossary of the Internal Rules, unless and until the Co-Investigating Judges decide that they no longer are. Contrary to the International Co-Investigating Judge's finding, Internal Rule 55(4) does not require that the Co-Investigating Judges make any decision that there is sufficient evidence for an individual *already named* in an Introductory Submission to be considered as a "Charged Person", given that this requirement relates only to those who *are not named*, as recalled above.[54] Internal Rule 57(1) does not suggest either that an initial appearance is a prerequisite for being considered a "Charged Person"; rather, by stating that "[a]t the time of the initial appearance the Co-Investigating Judges shall record the identity of the *Charged Person* [not the "Suspect"] and inform him or her of the charges (...)", it confirms that an individual named in an Introductory Submission is already considered as such.[55]

19. Secondly, we consider that a concrete examination of the rights attached to the status of "Charged Person" requires giving precedence to the expression "subject to prosecution" over the formal process of charging, in order to ensure respect of the fundamental principles governing proceedings before the ECCC, set out in Internal Rule 21. These fundamental principles, in particular, are to safeguard the interests of Suspects and Charged Persons;[56] ensure legal certainty and transparency of proceedings;[57] ensure that ECCC proceedings are fair and adversarial and preserve a balance between the rights of the parties;[58] and ensure that every person suspected or prosecuted is informed of any charges brought against him/her and of the right to be defended by a lawyer of his/her choice.[59]

20. The procedural regime adopted by the ECCC provides that upon filing of an Introductory Submission by the Co-Prosecutors, the Co-Investigating Judges perform a judicial

[52] Internal Rule 55(4). The Co-Investigating Judges cannot charge an individual not named in an Introductory or Supplementary Submission without first seeking advice from the Co-Prosecutors.
[53] Internal Rule 21(1)(d) grants these rights to "[e]very person suspected or prosecuted", which necessarily includes individuals named in an Introductory Submission.
[54] The same holds true in Cambodian Law. *See* Art.126(1) of the CPC.
[55] The same holds true in Cambodian Law. *See* Art. 143 of the CPC.
[56] Internal Rule 21(1).
[57] Internal Rule 21(1).
[58] Internal Rule 21(1)(a).
[59] Internal Rule 21(1)(d).

investigation into inculpatory and exculpatory evidence,[60] which ultimately leads them to either dismiss the case or issue an indictment committing the accused for trial.[61] When an indictment is issued, the case file containing all the evidence collected during the judicial investigation is transferred to the Trial Chamber and constitutes the basis of the trial,[62] as the parties are not allowed to conduct their own investigation. The judicial investigation is led by the Co-Investigating Judges but the parties are allowed to actively participate thereto, notably i) to request the Co-Investigating Judges to "make such orders or undertake such investigative action as they consider useful for the conduct of the investigation";[63] ii) to request the Co-Investigating Judges "to interview [them], question witnesses, go to a site, order expertise or collect other evidence on [their] behalf";[64] iii) to appeal against a number of decisions of the Co-Investigating Judges that are subject to appellate scrutiny or contest appeals lodged by other parties;[65] and iv) to request annulment of investigative acts affected by procedural defects.[66] To be given full effect, these rights should be afforded to all parties at the earliest opportunity, absent any competing legitimate interest. The Internal Rules indeed provide that they are available to the Co-Prosecutors from the beginning of the judicial investigation and to civil party applicants from the moment they file an application to be admitted as Civil Parties.[67] The Internal Rules further provide that they can be exercised "at any time during an investigation".[68] A coherent reading of the Internal Rules requires that similar to other parties, individuals who face a possibility of being indicted, as they are subject to prosecution, be afforded the opportunity to participate in the judicial investigation as early as possible.

21. Individuals named in an Introductory Submission are at particular risk of being ultimately indicted. They are the subject of specific allegations by the Co-Prosecutors that they may be criminally responsible for the crimes under investigation. Additional allegations of criminal responsibility may also be made in victims' complaints or civil party applications. The principle of equality of arms, enshrined in Article 14(3) of the ICCPR and reproduced in Internal Rule 21(1)(a), requires that they are afforded a reasonable opportunity to present

[60] Internal Rule 55(1) and (5).
[61] Internal Rule 67.
[62] Internal Rule 69.
[63] Internal Rule 55(10).
[64] Internal Rules 58(6) and 59(5).
[65] Internal Rule 74.
[66] Internal Rule 76, read in conjunction with the definition of "parties" set forth in the Glossary.
[67] *See* Internal Rule 23*bis* (2).
[68] *See* Internal Rules 55(10), 58(6) and 59(5).

their case under conditions that do not place them at a *substantial disadvantage* vis-à-vis the other parties.[69] In this regards, the Human Rights Committee has stated that the same procedural rights are to be provided to all parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.[70] The ECtHR also emphasised the need to attach importance to appearances as well as to the increased sensitivity to the fair administration of justice.[71] In the context of the ECCC, a difference in timing for participation in the judicial investigation and access to case file between the Co-Prosecutors, the Civil Parties and the civil party applicants, on the one hand, and the Suspect, on the other hand, may be legally justified by their different status and serve legitimate interests, notably to protect the integrity of the judicial investigation. However, this situation may, over time, create an imbalance, real or perceived, between the ability of the parties to state their case that would be difficult to remedy or compensate by any procedural safeguards. When individuals are specifically targeted by the Prosecution and the Civil Parties or civil party applicants are themselves afforded the possibility to influence the outcome of the investigation through, *inter alia,* requests for investigative actions and to construct their claim for collective and moral reparations,[72] such individuals should be given the opportunity to know the allegations against them, counter these and influence the judicial investigation in the same manner as the other parties. Therefore, individuals named in an Introductory Submission, because they are "subject to prosecution", shall be afforded the rights attached to the status of Charged Person, irrespective of the fact thay they have not been formally charged by the Co-Investigating Judges and summoned for an an initial appearance.

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[69] *See* ECtHR, *Abdulgadirov v. Azerbaijan,* Application No. 24510/06, Judgment, 20 June 2013 *and* Human Rights Committee, General Comment No. 32 [90] 13, CCPR/C/GC/32, 23 August 2007 ("General Comment No. 32"), para. 13.

[70] Human Rights Committee, General Comment No. 32, para. 13 and *Dudko v. Australia,* Communication No. 1347/2005, 23 July 2007, para. 7.4 ("It is for the State party to show that any procedural inequality was based on reasonable and objective grounds, not entailing actual disadvantage or other unfairness to the author.") Similarly the ECtHR has found in this regards that a minor inequality which does not affect fairness of the proceedings as a whole will not infringe article 6 of the Convention. *See* ECtHR, *Verdu Verdu v. Spain,* Application No. 43432/02, Judgment, 15 February 2007, paras 23-29 (where the Court found that the failure to communicate to the defendant the civil party's submission to join the prosecutor's appeal did not influence the outcome of the proceedings and therefore did not affect his rights). *See also* Dovydas Vitkauskas and Grigoriy Dikov, "Protecting the right to a fair trial under the European Convention on Human Rights", Council of Europe, Strasbourg, 2012, p. 48 (stating that while there is no exhaustive definition as to what are the minimum requirements of "equality of arms" are, there must be adequate procedural safeguards appropriate to the nature of the case and corresponding to what is at stake between the parties.)

[71] ECtHR, *Bulut v. Austria*, Application No. 17358/90, Judgment, 22 February 1996, para 47.

[72] *See* Internal Rule 23.

22. This interpretation reflects the rules applied in a number of domestic jurisdictions of civil law tradition, whereby individuals facing a possibility of being indicted, because they are named in an introductory submission or otherwise suspected to be responsible for the crimes alleged by the prosecution or a civil party, are entitled to participate in the judicial investigation and their lawyers have access to the case file, subject to possible restrictions or limitations that will be further discussed below. For instance, under the French Code of Criminal Procedure currently in force,[73] a suspect named in an introductory submission, although not anymore considered to be automatically a "charged person", is "an assisted witness".[74] The assisted witness, even if not a party to the proceedings until being "charged" by the investigative judge,[75] is entitled to participate in the judicial investigation[76] and to be represented by counsel. His or her counsel shall be given access to the investigation case file *at the latest* four days prior to the first interview by the investigating judge.[77] In Germany, *suspects* are allowed to participate in the investigation[78] and their lawyers are, in principle, allowed to access the case file from the beginning of the investigation (by the public prosecutor or the investigating judge, as appropriate) and at the latest prior to the first interview.[79] In Kosovo, "a person against whom the state prosecutor

[73] It is noted that the French Code of Criminal Procedure undergone a thorough reform in 2000, to counter the harmful social consequences for individuals as a result of being charged (*mise en examen*) and the necessity to strengthen the presumption of innocence. It aimed at putting off the moment when a person is charged – or even to avoid it –, while preserving the possibility for the investigating judge to interview the suspect and with the view to give the suspect necessary rights. *See* Christian Guéry, « Instruction préparatoire », *Répertoire de droit pénal et de procédure pénale Dalloz*, janvier 2008 (last update March 2013), paras 312 and 359. While individuals charged in an introductory submission are no longer considered as charged person by this mere fact, the French Code of Criminal Procedure has introduced the status of "assisted witness", to whom a number of rights have been granted. We note that the current provisions of the French Code of Criminal Procedure are different from the ECCC Internal Rules and Cambodian Law. Reference to this system is made here solely as part of a comparative analysis of the right to participate in the judicial investigation and to have access the case file in various legal systems.

[74] Art. 113-1 of the French Code of Criminal Procedure.

[75] *See, e.g.,* Cass. Crim. 13 February 2002, unpublished, pourvoi n° 01-83.529 ; Cass. Crim. 14 Feburary 2012, *Bull. Crim.* 2012 n° 45.

[76] The assisted witness is specifically granted the rights to i) ask to be confronted with the person(s) who accused or denounced him or her (Art. 113-3); ii) ask questions or present brief observations through his counsel during interviews and confrontations (Art. 120); iii) request annulment of investigative acts (Art. 113-3); iv) be notified of expertise reports and to request counter expertise (Art. 167); v) request the closing of the investigations (Art. 175-1) and to request to be placed under examination, at any time of the proceedings (Art. 113-6).

[77] *See* Arts 113-3 and 114 of the French Code of Criminal Procedure.

[78] *See* Michael Bohlander, *Principles of German Criminal Procedure,* Hart Publishing, 2012 ("Bohlander") ("Much of what happens at the trial will have been predetermined to a large degree – and mostly irreversibly so at the pre-trial stage – by the investigation of the police, the prosecution, the examining pre-trial judge and sometimes the defence. [...] *A potential defendant* must therefore have an interest in the best possible protection and the most effective means of participating in the proceedings against him from the very start when he is still a suspect.")

[79] *See* Section 147(1) of the German Code of Criminal Procedure, read in conjunction with Section 137, *and* Sections 163a and 136. *See also* Bohlander, p. 68.

has a reasonable suspicion that he or she has committed a criminal offence" must be named in the decision to initiate a judicial investigation and is automatically afforded all the same rights as defendants, including the right to participate in the judicial investigation.[80] The defendant or his counsel has access to the case file from the beginning of the judicial investigation.[81]

23. In the light of the foregoing, we find that the International Co-Investigating Judge commited an error of law in his understanding of the expression "Charged Person". An individual named in an Introductory Submission is a "Charged Person" from the moment the Introductory Submission is filed with the Co-Investigating Judges, unless a decision is taken by the Co-Investigating Judges that he or she is no longer subject to prosecution.

24. In the present case, TA An has been named by the International Co-Prosecutor as a person who may be responsible for the crimes set out in the Introductory Submision.[82] From the time the Introductory Submission was filed with the Co-Investigating Judges on 9 September 2009, opening a judicial investigation in Case 004, TA An became "subject to prosecution". It is noted that despite the fact that the investigation has been opened more than four years ago, no decision has been made yet by the Co-Investigating Judges to either lay formal charges and hold an initial appearance pursuant to Internal Rules 55(4) and 57 or dismiss the case against TA An under Internal Rule 67. Whilst this delay is unusal given the past practice of the Office of the Co-Investigating Judges and, generally, civil law jurisdictions, we do not see in it any indication that TA An would no longer be "subject to prosecution". Rather, the Co-Investigating Judges' delay in taking any formal action under either Internal Rules 57 or 67 appears to be the consequence of the threshold they have adopted for laying out charges pursuant to Internal Rule 55(4). In this regards, the current International Co-Investigating Judge has explained that TA An has not yet formally been charged as he has not made a determination as to whether there is "clear *and* consistent evidence" that he may be responsible for the crimes alleged in the Introductory Submission.[83] The International Co-Investigating Judge thereby elected to apply the same

[80] *See* Art. 103(3) of the Code of Criminal Procedure of Kosovo. *See also* Arts 9, 216(1) and 141.
[81] Art. 213(2) of the Code of Criminal Procedure of Kosovo explicitly provides that "[a]t the initiation of the investigative stage, the state prosecutor has a positive obligation to provide access to the case file to any named defendant or their defense counsel." This right is, however, subject to the possible restrictions which will be discussed later.
[82] *See* Introductory Submission, paras 5(1) and 82-90.
[83] Impugned Decision, para. 47.

standard as the one specifically set out in Internal Rule 55(4) *for individuals who are not named in an Introductory Submission, i.e* for individuals in respect of whom the Co-Prosecutors have not already expressed reasons to believe that they may have committed crimes within the jurisdiction of the ECCC, which is not the case with TA An. This standard is almost as stringent as that required to issue an indictment before the ECCC,[84] and is similar to the threshold required to issue an indictment before other international or internationalized tribunals.[85] It may therefore cause the decision to formally lay charges to be taken at an advanced stage of the investigation.[86] We further note that the then Reserve International Co-Investigating Judge has informed TA An on 29 February 2012 of the crimes for which he is alleged to be responsible, "based on both the facts alleged by the co-prosecutors (sic.) *and those uncovered thus far during the course of the investigation.*"[87] The current International Co-Investigating Judge did not give any indication that this statement may not be accurate anymore in the light of the progress of the investigation. We therefore find that given the fact that he is named in the Introductory Submission and absent any indication that he is no longer subject to prosecution, TA An is a "Charged Person" within the definition of the Internal Rules.

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[84] The threshold for indictment has been defined by the Co-Investigating Judges in the Case 002 Closing Order as requiring "probability of guilt", on the basis of "evidentiary material in the Case File that is sufficiently serious and corroborative to provide a certain level of probative force." *See* Case 002, Closing Order, 15 September 2010, D427, para. 1323.

[85] At the ICC, *see Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on Confirmation of Charges, Pre-Trial Chamber, 29 January 2007, paras 38-39 ("Accordingly, the Chamber considers that for the Prosecution to meet its evidentiary burden, it must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations.") *See also,* to the same effect: *Prosecutor v. William Samoei Ruto et al.*, ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber, 21 January 2012, para. 40. At the ICTY and ICTR, *see* Rule 47 (B) of the ICTY and ICTR Rules of Evidence and Procedure ("there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal"); *Prosecutor v. Milosevic et al.*, Decision on Review of Indictment and Application For Consequential Orders, Trial Chamber, 24 May 1999; *Prosecutor v. Delalic and Delic*, IT-96-21-T, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalic, Trial Chamber, 25 September 1996, para. 23 ("To constitute reasonable grounds, facts must be such which are within the possession of the Prosecutor which raise a clear suspicion of the suspect being guilty of the crime [...] The evidence, therefore, need not be overly convincing or conclusive; it should be adequate or satisfactory to warrant the belief that the suspect has committed the crime"); *Prosecutor v. Ntakirutimanaet al.*, ICTR-96-10-T, Decision on a Preliminary Motion Filed by Defence Counsel For and Order to Quash Counts 1,2,3, and 6 of the Indictment, 15 July 1998, para. 6 ("The term reasonable grounds can be interpreted as facts and circumstances, which could justify a reasonable or ordinary prudent person in believing that a suspect has committed a crime. There must be facts which raise a clear suspicion that the suspect is guilty of committing the offence, for reasonable grounds to exist.")

[86] For comparative purposes, it is noted that the standard for charging adopted by the International Co-Investigating Judge in the Impugned Decision is more stringent than the standard currently applied in the French system, where a person can be charged when there is *clear or consistent* evidence that the person may have committed a crime. *See* Art. 80-1 of the French Code of Criminal Procedure.

[87] 29 February Notification, para. 2.

25. In addition, we consider that affording TA An the opportunity to participate in the investigation and to have access to the case file, subject to possible limitations, is necessary, at this stage, to protect his fundamental right to a fair trial. Contrary to the International Co-Investigating Judge, we are of the view that TA An is also subject to "criminal charges" within the meaning of human rights law and, as such, entitled to the protection of Article 14 of the ICCPR. It is recalled that human rights law "favours a 'substantive', rather than a 'formal', conception of 'charge' [and] impels the Court to look behind the appearances and examine the realities of the procedure in question in order to determine whether there has been a 'charge'".[88] As set out by the ECtHR, "[w]hilst 'charge', *for the purposes of Article 6 § 1 (art. 6-1)* [the equivalent of Article 14 of the ICCPR] may in general be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect".[89] In this regards, we note that according to the ECtHR's case law, "a person has been found to be subject to a "charge", inter alia, when a preliminary investigation has been opened in his case and, although not under arrest, the applicant has officially learned of the investigation or has begun to be affected by it".[90] In the present case, TA An has been officially notified by a competent authority – *i.e.* the then Reserve International Co-Investigating Judge – of the investigation into crimes for which he is alleged to be responsible when he received the 29 February Notification. He is therefore entitled to the right to have adequate time and facilities to prepare his defence, as set out in Article 14(3)(b) of the ICCPR, in addition to the right to be treated as equal before the Court, discussed in general terms above.

26. Insofar as the right to prepare a defence is more particularly concerned, it concretely entitles TA An "to have knowledge of and comment on the observations filed and the evidence adduced by the other party"[91] before a decision to indict him is taken, if this is eventually the case. Contrary to the Defence's assertion, this does not mean that TA An is automatically entitled to have access to the case file, as human rights law, which focuses on the overall fairness of the proceedings, does not set a specific time when access to the case

[88] *See, e.g.,* ECtHR, *Adolf v. Austria*, Application No. 8269/78, Judgment, 26 March 1982, para. 30.
[89] ECtHR, *Foti v. Italy,* Application No. 7913/77, 10 December 1982, para. 51.
[90] ECtHR, *Kangasluoma v. Finland,* Application No. 48339/99, 20 January 2004, para. 26.
[91] ECtHR , *Öcalan v. Turkey,* Application No. 46221/99, Judgment, Grand Chamber, 12 May 2005 ("*Öcalan* Judgment"), para. 146.

file must be provided to a person subject to criminal charges.[92] Rather, it calls for an examination of the actions that are being taken by the Co-Investigating Judges at this time and the impact these may ultimately have on the course of the proceedings when considering the need to give TA An access to the case file.[93] In this regards, the ECtHR has underlined "the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at trial."[94] It further emphasized that "fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with [fair trial rights] provisions".[95] Given the central role played by the judicial investigation in ECCC's proceedings, access to the case file and opportunity to participate in the judicial investigation must be provided to TA An sufficiently prior to any decision being made on whether to issue an indictment against him, so as to allow him to get a *real* possibility to review all the evidence contained in the case file and be in a position where he may meaningfully request the collection of exculpatory evidence and state his position.

27. We cannot anticipate any decision of the Co-Investigating Judges to lay or not lay charges against TA An, nor if the judicial investigation is coming to a conclusion. However, considering that TA An is subject to being indicted and the investigation has already been ongoing for more than four years, with the participation of other parties to some extent, we find that TA An should be allowed to exercise the rights afforded to "Charged Persons" under the Internal Rules in order to protect his right to prepare a defence and to ensure

[92] *See, e.g. Öcalan* Judgment, para. 140 ("The Court further considers that respect of the rights of the defence requires that limitations on access by an accused or his lawyer to the court file must not prevent the evidence being made available to the accused before the trial and the accused being given an opportunity to comment on it through his lawyer in oral submissions."); *X. v. Austria,* Application No. 4622/70, Decision on Admissibility, European Commission of Human Rights, 22 March 1972, para. 2 (Given that the defendant had the opportunity to review the case before the trial, the ECtHR found that the lack of access to the investigation case file *before the issuance of an indictment* did not violate the right to prepare a defence.) *See also* Directive 2012/13/EU of the European Parliament and on the Council of 22 May 2012 on the right to information in criminal proceedings, Art. 7 (requiring the member States to establish procedure to "grant access, free of charge, to all meterial evidence, in sufficient time before the trial to enable the accused to prepare a defence effectively").

[93] *See,* in addition to the references quoted in the footnote above: ECtHR, *Foucher v. France*, Application No. 22209/93, Judgment, 18 March 1997, paras. 32-38 (where the Court found that the failure to give any access to the case file to a self represented accused *prior to the trial* violated his right to prepare a defence). *See also*, more generally on the right to prepare a defence, Appeal Decision on Reliance on Evidence Obtained Through Torture, para. 33 (where the Pre-Trial has emphasised that the right to prepare a defence is to be seen in the light of the progress of the case); Case 002 (PTC104), Decision on KHIEU Samphan's Appeal Against the Closing Order, D427/4/15, 21 January 2011, para. 23 (where the Pre-Trial Chamber stated that "[a]n adversarial debate is possible at various stages of the proceedings.")

[94] ECtHR, *Salduz v. Turkey,* Application No. 36391/02, Judgment, Grand Chamber, 27 November 2008 ("*Salduz* Judgment"), para. 54.

[95] *Salduz* Judgment, Grand Chamber, para. 50 (in this case, the applicant had been denied the right to a lawyer while in police custody, but the reasoning applies *mutadis mutandis* to the issue at stake in the present case).

adherance to the principle of equality of arms. Any additional delay may cause TA An to be unable to *effectively* and meaningfully exercise the rights during the judicial investigation envisaged by the Internal Rules as most of the evidence would have already been collected and the decisions on the rights and obligations of the parties taken and implemented. As such, no procedural safeguard could at this stage remedy the difference in treatment between the parties, and TA An's ability to point towards exculpatory evidence and put forward his position in order to influence the Co-Investigating Judges' decision to either dismiss the case or issue an indictment may be impaired. We note that this case concretely illustrates why the interpretation of the notion of "Charged Person" adopted above best ensures the coherence of the legal regime envisaged in the ECCC legal compendium, the fundamental principles set out in Internal Rule 21 and the provisions of Article 14 of the ICCPR.

28. In the light of the foregoing, we find that the International Co-Investigating Judge committed an error of law in finding that TA An is not a "Charged Person" within the definition of the Internal Rules and, in turn, denying both his Requests to Access the Case File and to Participate in the Judicial Investigation. Consequently, the Impugned Decision should in our opinion be overturned insofar as it denies TA An's Request to Participate in the Judicial Investigation. We are also of the view that TA An's lawyers should, in principle, be given access to the case file. However, we are not in a position to actually grant the Request for Access to the Case File and order that TA An's lawyers be given full and unrestricted access to the case file as we cannot assess the impact that this may have on the on-going investigation.

29. In this regards, we acknowledge that there may be legitimate reasons to delay access to the case file, restrict the information that is made available to counsel or limit the communication of information to TA An at this stage of the proceedings. As neither the ECCC legal compendium nor Cambodian Law addresses this issue, we note that the procedural rules established at the international level,[96] similar to domestic jurisdictions, allow restrictions to be imposed on information that is disclosed to the defendant to protect interests such as the integrity of the investigation, the security of victims and witnesses and

[96] *See* Art. 23*New*(1) of the ECCC Law (which states in its relevant part: "If existing procedures do not deal with a particular matter [...] the Co-Investigating Judges may seek guidance in procedural rules established at the international level.")

national or international security.[97] Although there is no such things as a judicial investigation or an "official case file" at the other international and internationalised tribunals,[98] their rules of procedure and evidence all provide possibility to limit the disclosure obligations of the prosecution and therefore withhold evidence from the accused for a certain period of time, subject to judicial scrutiny, to protect the aforementioned interests.[99] The same holds true for domestic systems of both common law[100] and civil law[101] traditions. It is noted that the investigative authorities in inquisitorial systems are

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[97] *See, e.g.,* Special Tribunal for Lebanon, *In the matter of El Sayed,* Case CH/PTJ/2010/005, Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr. El Sayed Dated 17 March 2010 and Whether Mr. El Sayed has Standing before the Tribunal, Pre-Trial Judge, 17 September 2010, para. 53 ("With regard to the question of the exercising of the right of access to the criminal case file, it follows from legislation and case law, both national and international, that this right is not an absolute one. Indeed, this right can be subject to limitations. These case arise in particular from the fact that to make the document available might compromise an ongoing or future investigation, undermine fundamental interests, such as the physical well-being of persons concerned by those documents, or affect national or international security. These limitations can also stem from difficulties inherent to the conduct of terrorists investigations.")

[98] *See* Hakan Friman, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2010, pp. 462-463 ("ICTR and ICTY procedures are primarily adversarial in nature and disclosure is regulated against this background.") *and* p. 464 ("At the ICC disclosure [also] takes place between the parties and there has not (so far) been any all-embracing 'dossier'.")

[99] *See* Rules 66(C), 68(iv), 69(A), 70(B) and 75(A) of the ICTY Rules of Procedure and Evidence; Rules 66(C), 68(D), 69(A), 70(B) and 75(A) of the ICTR Rules of Procedure and Evidence; Rules 81(2), 81(3), 81(4) and 133(A) of the ICC Rules of Procedure and Evidence; Rules 39(ii), 66(B), 69(A), 70(B) and 75(A) of the Special Court for Sierra Leone Rules of Procedure and Evidence; Rules 55(C), 115(A), 116(A), 117(A) and 118(A) of the Special Tribunal for Lebanon Rules of Procedure and Evidence.

[100] *See, e.g.,* **in Canada:** *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, at p. 349 (stating that the Prosecution has a discretionary power, subject to judicial review, to refuse the discolosure of information or delay it, notably to protect the identity of informants and the security of witnesses), **in England and Wales:** Sections 14 to 16 of the Criminal Procedure and Investigations Act 1996 (providing that the objective disclosure test must be followed unless the material is senstive, in which case a public interest immunity application may be made before the Court) and **in the State of Victoria (Australia):** *Sankey v. Whitlam* (1978) 142 CLR 1 Gibbs ACJ at 38-39 (referring to a similar standard than the one applied in England).

[101] **In France**, prior to communicating the case file to his or her client, the counsel shall inform the investigating judge, who can prohibit such communication on account of risks of pressure on witness, victims, other person placed under examinations, investigators, experts or any person contributing to the investigations (*see* Art. 114(5) of the French Code of Criminal Procedure).
In Germany, before issuance of the notice of conclusion of investigation by the public prosecution, access to case file can be denied to Defence counsel when this "may endanger the purpose of the investigation" (*see* Section 147 of the German Code of Criminal Procedure). Access to the case file can be reinstated at any time, and must be reinstated upon conclusion of the investigations at the latest (*see* Section 147(6) of the German Code of Criminal Procedure) In any cases, at no stage of the proceedings defence counsel can be refused inspection of records concerning the examination of the accused or concerning judicial acts of investigation to which he was or should have been admitted, nor may he be refused inspection of expert opinions (*see* Section 147(3) of the German Code of Criminal Procedure).
In Kosovo, Article 213 (7) and (8) provide the following restriction on access to the case file: "7. Information can be redacted or marked out by a thick black line to obscure specific information by the state prosecutor on copies of documents that contain sensitive information. The defendant may challenge the redaction with the pretrial judge, single trial judge or presiding trial judge within three (3) days of receiving the redacted copy. The state prosecutor shall be permitted the opportunity to explain the legal basis of the redaction without disclosing the sensitive information. The judge shall review the redacted information and shall decide within three (3) days whether the redaction is legally justified. 8. Provisions of the present Article are subject to the measures protecting injured parties and witnesses and their privacy and the protection of confidential information as provided for by law."

given a broad discretion to limit access to the "case file" during the judicial investigation,[102] owing to the fact that access is granted while the investigation is still on going and before any indictment is issued, so the risks to the integrity of the investigation are more acute and any restrictions on access to the case file at this stage can more easily be compensated by procedural safeguards. From a human rights perspective, limitations on a procedural guarantee such as the right to access the case file are acceptable as long as (i) they serve a legitimate interest and (ii) that, in the light of the entirety of the proceedings, the defendant is not deprived of a fair hearing.[103] In this regards, the ECtHR stated:

> 78. However, the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.[104]

We therefore find that insofar as the Request to Access the Case File is concerned, the matter should be remitted back to the Co-Investigating Judges, for them to decide in accordance to law.

Phnom Penh, 15 January 2014

Chang-ho CHUNG **Rowan DOWNING**

[102] *See* references quoted in the footnote above.
[103] *See, e.g.*, on restrictions to the right to a lawyer, *Salduz* Judgment, para. 52.
[104] ECtHR, *Leas v. Estonia*, Application No. 59577/08, Judgment, para. 78 (references omitted).